Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Requests of U S West Communications, Inc. for Interconnection Cost Adjustment Mechanisms

AC97-90
File No. _____

PETITION FOR DECLARATORY RULING AND CONTINGENT PETITION FOR PREEMPTION

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SUMMARY

U S West has filed with the public utility commissions in each of the fourteen states within its service territory requests for authority to implement Interconnection Cost Adjustment Mechanism surcharges ("ICAM"). If these requests are granted, U S West would impose special surcharges to recover certain "extraordinary" costs that its claims to have incurred to "transform" its network to comply with the local competition requirements of the 1996 Telecommunications Act. Incredibly, U S West makes these requests while acknowledging that the pricing provisions of the 1996 Act do not permit recovery of those costs. Moreover, in its state filings, U S West actually threaten not to fulfill its local competition obligations under the 1996 Act unless it is permitted by the states to implement its desired ICAM surcharges.

U S West's ICAM proposals are only the most recent element of its orchestrated strategy of initiating expensive and time-consuming litigation intended to stop or delay competition throughout its territory in complete frustration of the goals of the 1996 Act. Section 252(d) of the Communications Act of 1934 clearly requires that the pricing of interconnection and network elements must be based on the cost of providing the interconnection or network element. The costs associated with upgrading and rearranging an incumbent LEC's network to fulfill its obligations under Section 251 of the Act are not permitted to be recovered through an incumbent local exchange carrier's ("ILEC") charges for interconnection and network elements. In addition, the institution of U S West's proposed ICAM surcharges either on competitive local exchange carriers ("CLECs") or local service customers would constitute a barrier to entry to new market entrants in violation of Section 253 of the Act. Finally, denial of U S West's request to pass these costs onto CLECs and/or end users would not constitute an illegal taking

of property.

If CLECs are forced to incur the costs associated with building not only their own networks, but also with upgrading and rearranging the networks of ILECs, new competitors will be severely hampered in their efforts to offer local telecommunications services in competition with U S West throughout U S West's service territory. U S West must not be allowed to continue to delay competition within its territory by initiating state actions intended to impose its network rearrangement costs on its customers and on new market entrants.

If ILECs are entitled to recover their costs associated with rearranging and upgrading their networks to enable competitors to interconnect with them, then competitors are no less entitled to recover from ILECs and other CLECs their same costs of constructing and rearranging their networks to interconnect with the ILEC and other CLECs. Clearly, the 1996 Act neither provides for such cost recovery nor intended to do so. For these reasons, the undersigned CLECs respectfully request that the Commission expeditiously issue a declaratory ruling that the initial costs incurred by ILECs to meet statutory requirements of the 1996 Act, which are not otherwise recoverable pursuant to Section 252(d) of the Act, are not recoverable through state-imposed surcharges on either CLECs or end user customers. In addition, if any state commission allows U S West to implement ICAM surcharges or otherwise impose surcharges on competitors to recover U S West's purported network rearrangement, upgrade and administrative costs of providing interconnection and unbundled network elements, then Petitioners respectfully urge the Commission to exercise its authority to preempt such state actions pursuant to Section 253 of the Communications Act.

TABLE OF CONTENTS

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Electric Lightwave, Inc., McLeodUSA Telecommunications Services, Inc., and NEXTLINK Communications, L.L.C. (hereinafter, "Petitioners"), by their attorneys, pursuant to Section 1.2 of the Commission's Rules and Section 253 of the Communications Act of 1934, as amended (the "Act"), hereby petition the Commission for issuance of a declaratory ruling that proposals of U S West Communications, Inc. ("U S West") to implement in each of its states Interconnection Cost Adjustment Mechanism ("ICAM") surcharges are violative of the provisions of the Telecommunications Act of 1996 and the Congressional policy underlying that Act (the "1996 Act"), as well as applicable Commission rules and policies. This petition also is filed pursuant to paragraph 125 of the Commission's First Report and Order in CC Docket No. 96-98 whereby the Commission offers to provide guidance to the states and to other parties regarding the 1996 Act in general, and the local competition requirements in particular.[1]

[1]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (*First Report and Order*), CC Docket No. 96-98, FCC 96-325, ¶ 125 (released August 8, 1996)("First Report and Order").

Further, in the event that any state permits U S West to assess ICAM surcharges and to recover additional costs pursuant thereto, then Petitioners respectfully ask the Commission to exercise its preemption authority codified at Section 253 of the Act. In support thereof, Petitioners state as follows:

INTRODUCTION

On January 3, 1997, U S West filed a Petition with the Utah Public Service Commission ("UPSC") seeking a declaratory ruling and UPSC action to enter an Order adopting and implementing an ICAM for certain "extraordinary interconnection costs incurred, or to be incurred, on an intrastate basis."[2] U S West filed a virtually identical request with the Arizona Corporation Commission ("ACC") on January 6, 1997.[3] Substantially identical ICAM requests have been made by U S West in all fourteen states within the U S West territory.[4]

In those state filings, U S West asks that each state allow it to impose special surcharges to recover certain "extraordinary" costs that it claims to have incurred to "transform" its network

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[2]Application of U S West Communications, Inc. for the Interconnection Cost Adjustment Mechanism, *Petition for Declaratory Ruling and Request for Agency Action filed by U S West Communications, Inc.*, Dkt. No. 97-049 (Filed with the Public Service Commission of Utah on January 3, 1997) ("Utah Petition"). A copy of that petition is attached hereto as Exhibit A.

[3]Petition of MCIMetro Access Transmission Services, Inc. for Arbitration of the Rates, Terms and Conditions of Interconnection with U S West Communications, Inc. Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996, *U S West Communications' Motion to Sever Cost Issues and Establish Additional Cost Recovery Proceeding and Alternative Motion for Extension of Time to File Prefiled Direct Testimony*, Dkt. No. U-3175-96-479, (Filed with the Arizona Corporation Commission on January 6, 1997) ("Arizona Petition"). A copy is attached hereto as Exhibit B.

[4]See, *e.g.*, "U S West Asks State Regulators for Help Developing Interconnect Cost Recovery Plan," TR Daily, Jan. 16, 1997 at 1.

to accommodate its prospective competitors.[5] U S West claims to have expended $16 million through the third quarter of 1996 throughout its 14 state region for such "rearrangements." U S West has stated that it expects to spend between $500 million and $1 billion over the next three years on the network upgrades and rearrangements that it seeks to recover through its ICAM.[6] These expenses claimed by U S West include the following:

1) systems costs to start the process of making software changes to allow for service assurance, capacity provisioning, billing and service delivery for competitive local exchange carriers ("CLECs");

2) costs to expand network capacity in U S West's tandems and interoffice facilities to accommodate CLECs' anticipated traffic demands on U S West's network; and

3) start-up costs associated with the establishment of service centers to process CLEC service orders.

To recover these alleged "extraordinary" costs, U S West proposes to impose monthly ICAM surcharges on its competitors of the magnitude of approximately $144,000 for interconnection, $35,000 for unbundled network elements, and $9,000 for resale. These amounts would be subject to periodic true-ups. As an alternative to these charges on competitors, US West suggests that these costs be recovered directly from end users in the form of a $0.76 per month line charge.[7] Incredibly, U S West makes these requests while at the

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[5]See, *e.g.*, Utah Petition at 4.

[6]Utah petition at 3.

[7]These prices are taken from U S West's filing in the State of Washington. See U S West Communications, Inc., Advice No. 2821T, Docket No. UT-970010, Tariff WN-U-36 Access Service, Section 15, Original Sheet 1 (Filed with the Washington Utilities and Transportation Commission January 3, 1997). U S West has proposed comparable, albeit slightly different ICAM surcharges in its other states based upon the costs that U S West anticipates expending in each of those states to get ready for competition.

same time acknowledging that the pricing provisions of the 1996 Act do not permit recovery of these costs. Such charges, whether imposed upon CLECs as ICAM surcharges or on end users are in blatant contravention of the statutory pricing requirements codified at Section 252(d) of the Act.[8] Notwithstanding that statutory prohibition, U S West argues that without such a cost recovery mechanism as its proposed ICAM, it would be subject to an unconstitutional taking.

Each of the undersigned Petitioners is a CLEC that is currently authorized to provide service in states within U S West's service territory. If these companies are forced to incur the costs associated with building not only their own networks, but also with upgrading and rearranging U S West's networks to allow U S West to continue to operate as the incumbent local exchange carrier ("ILEC") in the newly-competitive telecommunications environment, these competitors will be severely hampered in their efforts to continue their current services as well as to expand their service offerings to additional areas throughout U S West's territory. In short, the imposition of an ICAM would undermine the development of local exchange service competition and therefore undermine the pro-competitive goals of the 1996 Act.

Section 252(d) of the Act clearly provides that the pricing of interconnection and network elements must be based on the cost of providing the interconnection or network element. The costs associated with upgrading and rearranging an incumbent LEC's network to provide the necessary interconnection pursuant to Section 251 of the Act are not permitted to be recovered through an ILEC's charges for interconnection and network elements. In addition, the institution of U S West's proposed ICAM surcharges either on CLECs or on all U S West customers would constitute a barrier to entry to new market entrants in violation of Section 253 of the Act.

[8]47 U.S.C. § 252(d).

Finally, denial of U S West's request to pass these costs onto CLECs and/or end users would not constitute an illegal taking of property. The filing of its ICAM requests is simply U S West's latest attempt to forestall local service competition within its territory.

I. Costs Associated With U S West's Network Rearrangements Are Not Recoverable Costs Pursuant to Section 252(d) of the Communications Act.

In support of its proposed ICAM surcharges, U S West states that neither the Commission's First Report and Order, nor the implementing regulations, contain or create a funding mechanism for recovery of the costs associated with the "extraordinary" start-up charges for network rearrangements to provide interconnection and unbundled network elements to its competitors."[9] In addition, U S West states that no other source of payment exists or has been created either federally or locally that will provide it with full or timely recovery of all of its costs.[10]

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[9]Utah Petition at 3.

[10]Incredibly, U S West attempts to persuade state commissions to allow it to implement its ICAM surcharges on the basis that the Commission has not completed its universal service proceeding and that universal service funds are not available to finance U S West's network rearrangement costs. See, *e.g.*, Utah Petition at 3-4. To even suggest that universal service funding should be used to recover ILEC network rearrangement costs perverts the universal service objective embodied in the 1996 Act beyond recognition. Section 254(c) of the Act states that universal service is an evolving concept that should be defined to include services that meet the following criteria: 1) essential to education, public health, or public safety; 2) through operation of market choices by customers, have been subscribed to by a substantial majority of residential consumers; 3) deployed in the public network by telecommunications carriers; and 4) are consistent with the public interest, convenience, and necessity. Further, Section 254(b) articulates the following principles to be followed in advancing universal service: 1) availability of quality services at reasonable and affordable rates; 2) access to advanced telecommunications and information services throughout the nation; 3) access to such services in rural and high cost areas that are reasonably comparable to urban areas; 4) equitable and nondiscriminatory support of universal service by telecommunications carriers; 5) specific and predictable Federal and State

Therefore, U S West argues, it is a violation of the Fifth and Fourteenth Amendments of the United States Constitution for the federal and state governments to force it to incur the expense of upgrading or rearranging its network to provide the interconnection necessary to allow for the development of a competitive telecommunications market without similarly providing the opportunity for recovery of those upgrade and rearrangement costs through interconnection and network element charges.

Recovery of an ILEC's costs associated with upgrading or rearranging its network in order to comply with the federally-mandated interconnection requirements, in the manner proposed by U S West's ICAM, would violate Section 252(d) and would defeat the pro-competitive goals of the 1996 Act. Indeed, U S West acknowledges in its state pleadings that the 1996 Act does not permit the recovery of these costs. For example, in its Utah Petition, U S West states as follows:

> The Telecommunications Act of 1996 contains no mechanism for financing or paying for unplanned network upgrades, the acceleration of planned upgrades in order to comply with state and federal mandates, extensions and/or modifications of network facilities or operational support systems, including data bases and electronic interfaces, [ ] all of which are or will be necessary to provide [U S West's] competitors with interconnection, access to

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support mechanisms; and 6) access to advanced services for schools, health care providers and libraries. The Federal-State Joint Board in CC Docket No. 96-45 has recommended that competitive neutrality be added to the list of universal service principles. That U S West has the audacity to suggest a right to recover network upgrade and rearrangement costs within those universal service definitional standards and principles is nothing short of mind-boggling. Seemingly lost on U S West is the notion that universal service is a legislative principle which establishes that all Americans have a right to a certain level of telecommunications and information services at affordable prices. The purpose of universal service within the 1996 Act is not to ensure that special funds be allocated to ILECs to recover their asserted network upgrade and rearrangement costs to interconnect their networks with those of their prospective competitors.

> unbundled network elements and the ability to resell [U S West] retail services.[11]

Notwithstanding its own express recognition of the limitations on cost recovery set forth in the 1996 Act, U S West requests that the state commissions allow it to exceed those limitations in order to foist its desired ICAM surcharges either upon its competitors or upon the entirety of its local service customer base. In effect, U S West asks that state public utility commissions find Section 252(d) of the Act unconstitutional and to order cost recovery relief that is inconsistent with that provided for in the 1996 Act.

ILEC costs associated with network rearrangements required to fulfill the pro-competitive mandates of the 1996 Act are not recoverable interconnection costs pursuant to Section 252(d). Section 252(d) provides that pricing of interconnection and network element charges shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element." In establishing the standard for allowable cost recovery by ILECs for the provision of interconnection, access to unbundled network elements, and resale, Congress struck a balance between affording ILECs a reasonable opportunity to recover their costs on the one hand, and not erecting economic barriers to local service competition on the other hand. That carefully-crafted balance and the pro-competitive goals of the 1996 Act would be frustrated by the recovery of extraordinary costs of providing interconnection and network elements beyond that specifically permitted by the 1996 Act, as proposed by U S West in its various state petitions seeking to implement ICAM charges.

In the First Report and Order, the Commission concluded that national pricing principles

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[11]Utah Petition at 2; See also, Arizona Petition at 4.

should be established to implement Congressional policy. Following a very thorough analysis of several different pricing theories, the Commission settled on a forward-looking long-run incremental cost model. Although the Commission's pricing guidelines have been stayed by the United States Court of Appeals for the Eighth Circuit pending judicial review,[12] the reasoning used by the Commission in promulgating these requirements is correct and clearly demonstrates that extraordinary costs such as those proposed by U S West should not be included in interconnection and network element charges. In addition, despite the stay, state public utility commissions throughout U S West's territory and around the country have independently reached conclusions similar to the Commission's.[13]

As the Commission and the state public utility commissions have properly concluded, the prices for interconnection and network elements critical to the development of a competitive local exchange market should be based on forward-looking economic costs of those elements. These may be higher or lower than the actual costs of the investment used to provide the services. However, only forward-looking economic costs will encourage efficient levels of investment in facilities as well as entry into the local telecommunication markets.

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[12]Iowa Utilities Board et al. v. FCC, No. 96-3321, *Order Granting Judicial Review* (8th Cir. Oct. 15, 1996). See also, *Order Lifting Stay in Part* (Nov. 1, 1996).

[13]See, *e.g.*, American Communications Services, Inc., New Mexico State Corporation Commission Dkt. No. 96-307-TC, Dec. 6, 1996 at ¶ 21. ("The reasoning used by the FCC to develop its regulations on forward-looking economic cost [] is persuasive and, therefore, will be the basis for this Commission's approach to the development of economic costs for pricing in this arbitration"); AT&T Communications of Illinois, Inc., Illinois Commerce Commission Dkt. 96 AB-003, Nov. 26, 1996 at ¶ 20. See also, "Former Antitrust Division Chief Economists Lend Hundt Support on TELRIC," Communications Daily, Dec. 6, 1996. (Five former chief economists of the Antitrust Division jointly praise TELRIC as a standard that will promote local competition and efficiency).

Based upon U S West's state filings, it appears that significant portions of these network rearrangement and upgrade costs that U S West seeks to recover through its ICAM surcharges are for construction of interoffice transport facilities. For example, in its Utah petition, U S West states that its network rearrangement costs will include "costs to add additional interoffice transport facilities and to add additional capacity at the tandem."[14] U S West then complains that under the TELRIC-based pricing required by state commissions it will not be able to recover all of those costs. Significantly, the Commission, in its First Report and Order, addressed the issue of cost recovery for transmission facilities dedicated to transmission of traffic between two networks, and concluded that such cost recovery should be limited. Specifically, the Commission held that for dedicated transport between an ILEC and an interconnecting carrier (*i.e.*, a local competitor), the amount to be paid by the interconnecting carrier for such dedicated transport is to be proportional to its relative use of the dedicated facility.[15] Since the transport facilities in question are two-way facilities, the providing carrier is not entitled to recover the entirety of the cost of those facilities. Yet, that is precisely what U S West is seeking to recover through its proposed ICAM charges with respect to the transport facilities to be used to connect U S West's network with those of its competitors.

Other costs that U S West seeks to recover through ICAM surcharges include such items as tandem expansion, systems costs for ordering, provisioning, and billing, and start-up costs for the establishment of CLEC service centers. These costs are not to be recovered through interconnection and network element charges. Rather, the network rearrangement and upgrade

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[14]Utah petition at 3 n.1.

[15]First Report and Order, *supra* at ¶ 1062.

costs and administrative costs that U S West is attempting on a state-by-state basis to foist upon its competitors through ICAM surcharges, are part of U S West's overall rate base. This is true for all of those costs incurred in anticipation of competition, but is especially true with respect to those facilities (*e.g.*, expanded tandem capacity) on U S West's side of the interconnected facilities. If U S West wishes to obtain state approval to recover these costs, its requests should not be considered in the context of "extraordinary" ICAM surcharge filings. They should be considered along with their effect on U S West's other services (including any cost savings resulted from such rearrangements and upgrades) in the context of state rate cases. Instead of pursuing rate relief through general rate cases, U S West asks that each state commission, notwithstanding the clear statutory limitations in Section 252, act as "insurers" of U S West's costs of allowing new entrants into its local markets. Such "competition insurance" was not Congress's intent in enacting the 1996 Act, and was not the Commission's intent in promulgating rules to implement the Act.

II. The Imposition of Interconnection Surcharges on CLECs or End Users Would Be a Barrier to Entry in Violation of Section 253 of the Communications Act.

Section 253(a) of the Act explicitly prohibits states from implementing any statute, regulation, or other legal requirement, that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.[16] This prohibition, added to the Act by the 1996 Act, is unequivocal. By its ICAM proposal, U S West asks that each state commission do precisely what Section 253 forbids: adopt requirements that

[16] 47 U.S.C. §253(a).

would have the effect of prohibiting each of the undersigned CLECs as well as other existing and prospective local service carriers from providing interstate and intrastate service by imposing market entry costs beyond those contemplated by the 1996 Act. Since Section 252(d) does not allow for the inclusion of an ILEC's "extraordinary" costs of upgrading and rearranging its network in order to comply with the Congressional mandate to interconnect, the imposition of such costs on CLECs or end users would constitute an additional state requirement that functions as a barrier to entry.

Although states are not prohibited from imposing requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers, any such additional requirements must be imposed on a "competitively neutral basis."[17] There is nothing competitively neutral about U S West's proposed ICAM surcharges. Indeed, it is difficult to imagine any requirement more designed and intended to skew competition and to favor incumbent monopolists *vis-a-vis* new market entrants than U S West's proposed ICAM surcharges. Those surcharges would result in additional compensation paid to U S West by new market entrants beyond the costs that U S West is statutorily entitled to recover. Stated simply, ICAM surcharges would be "entry fees" imposed by the ILEC upon prospective competitors for the right to compete with it. Of course, U S West -- the incumbent -- would not be subject to that entry fee.[18] The proposed ICAM would not only increase the costs of new market

[17]47 U.S.C. § 253(b).

[18]If, as asserted by U S West, ILECs are entitled to immediate compensation for rearranging and upgrading their networks to enable competitors to interconnect with them, then it would follow that competitors are no less entitled to recover from incumbent LECs their costs of

entrants, it would actually reduce the costs U S West must incur.

If the states permit U S West to impose ICAM surcharges on the CLECs within its territory, the payment of this "interconnection surcharge" would constitute an impermissible condition of doing business within the state and therefore would be a barrier to entry. Because the imposition of ICAM surcharges would constitute a barrier to entry in violation of Section 253(a), and would violate the "competitively neutral" requirement of Section 253(b), preemption of such requirements would be warranted. Section 253(d) authorizes the Commission to preempt enforcement of a state statute, regulation, or other legal requirement that permits such a surcharge. In two recent decisions, the Commission demonstrated that it has the statutory authority to preempt state requirements that are contrary to the 1996 Act and that it is prepared to do so in appropriate situations.[19] It should similarly exercise that statutory preemption authority against any state which accedes to U S West's unprecedented ICAM cost recovery demands.

In this regard, Petitioners deem it necessary to direct the Commission's attention to the threatening nature of U S West's state ICAM demands. U S West has actually threatened not to fulfill its statutory local competition obligations in states where it does not get its way on ICAM surcharges. For example, in the Utah Petition, U S West makes the following threat:

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arranging their networks to interconnect with the ILEC and to terminate the ILEC's traffic on their competing networks. Thus, if state commissions acquiesce in U S West's ICAM proposals, and the Commission does not preempt such state actions, it may become necessary for competitors, including Petitioners, to make similar demands for fees to recover their network construction and/or rearrangement costs.

[19]Classic Telephone, Inc., FCC 96-397, released October 1, 1996, New England Public Communications Council, FCC 96-470, released December 10, 1996.

"If the [Public Service] Commission does not undertake expeditious treatment of this request, USWC reserves the right to re-evaluate the appropriateness of further expenditures after notice to the Commission."[20] U S West has articulated the identical threat in each of its other state ICAM surcharge filings. By threatening not to incur expenditures to implement the requirements of the 1996 Act, U S West is attempting to "bully" state commissions into allowing it to recover costs beyond those contemplated by the 1996 Act. Petitioners hope that none of the states in U S West territory will capitulate to such extortionist demands. If any state does so accede to such demands, it would become critical that the Commission step in and preempt such state actions.

III. The Requirement That ILECs Upgrade Their Own Networks in Order to Provide Interconnection as Required by the 1996 Act Is Not an Unconstitutional Taking.

As a preliminary matter, it must be noted that the "takings" arguments that underlie U S West's state ICAM surcharge requests have already been raised by U S West and other ILECs in their petitions for review of the First Report and Order pending before the Eighth Circuit.[21] That is, U S West seeks the same relief from each of the state commissions that it is pursuing in the Court of Appeals. In fact, U S West has filed an extensive brief in that proceeding on the issue of the Commission's pricing guidelines and unconstitutional takings. The Eighth Circuit proceeding -- not fourteen separate state ICAM surcharge request proceedings -- is the

[20]Utah Petition at 9.

[21]See Iowa Utilities Board, *et al*, Brief for Petitioners, Regional Bell Companies and GTE, filed Nov. 18, 1996.

proper forum to resolve the constitutionality of the Commission's rules implementing Section 252(d) of the Act.

U S West argues that it is unconstitutional for it to be required to make significant expenditures for the "benefit of its competitors" in order to allow competitors to connect their networks with U S West's network, without being afforded the right to recover reasonable compensation to U S West for such expenditures. In effect, U S West claims that if it is not allowed to immediately recover all of its alleged costs in fulfilling its 1996 Act obligations then an unconstitutional taking has occurred.

As discussed in the Commission's First Report and Order, the Supreme Court has recognized that investor-owned public utilities are entitled to charge just and reasonable rates that result in a return on equity commensurate with returns on investments in other enterprises having corresponding risks.[22] However, public utilities are not entitled to earn a profit on each specific investment:

> If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.[23]

As stated by the Commission, the Constitution requires only that the end result of its overall regulatory framework provides LECs a reasonable opportunity to recover a return on their investment. Section 252(d) and the Commission's rules provide such opportunities. No more is required.

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[22]First Report and Order, *supra* at ¶¶ 733-735. (Analyzing Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944)).

[23]Hope Natural Gas, *supra*, 320 U.S. at 602.

IV. Through an Orchestrated Strategy of Initiating Expensive and Time-Consuming Litigation Intended to Stop or Delay Competition Throughout its Territory, U S West Continues to Frustrate the Goals of the 1996 Act.

U S West's state-by-state ICAM surcharge proposal should be seen by the Commission for what it really is: an attempt by U S West to gain leverage in its interconnection negotiations with new market entrants and to delay the advent of local competition within each state in its operating territory. U S West's ICAM filings in concert with its Eighth Circuit appeal, comprises, an orchestrated strategy of expensive and time-consuming multi-forum litigation to stop or delay local telecommunications service competition throughout its territory. The meritless nature of U S West's ICAM proposals clearly evinces the true purpose of the requests.

U S West's requests to implement ICAM surcharges in each of its states are attempts to have each state public utility commission effectively declare the 1996 Act to be unconstitutional, and to allow U S West to recover funds for performing its obligations under the 1996 Act far beyond that contemplated by the 1996 Act itself, or by the Commission's rules implementing the 1996 Act. It is inappropriate for state commissions even to address this issue. State commissions are not the proper forums for deciding the constitutionality of the 1996 Act.[24] Unless or until Section 252(d) is found to be unconstitutional or otherwise repealed, the state

[24]See Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), in which the court found that it did not have power to decide whether the Commission's physical co-location regulations constituted an unconstitutional taking of property. If the Commission can show statutory authority for its orders and regulations, those challenging the regulations on constitutional grants are remitted to a Tucker Act remedy because equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. The only question the court would consider was whether the orders under review were indeed duly authorized by law.

commissions are bound to comply with the statutory requirements contained therein. Undoubtedly, U S West's requests to have the states find Section 252(d) of the Act to be unconstitutional are completely without merit. Therefore, the filing of fourteen such requests can only be considered an attempt to delay competition within U S West's territory.

U S West's ICAM surcharge requests also reflect that company's failure either to understand or to embrace the pro-competitive objectives of the 1996 Act. For example, U S West frames the issue of its obligation to provide interconnection as a "benefit to competitors."[25] U S West also states that the network rearrangements mandated by the Act are for the convenience and use of its competitors and to facilitate U S West's existing customers' ability to choose a different local exchange service provider.[26] Contrary to those assertions, the goal of the interconnection and competition provisions of the Act is not to "benefit" or "convenience" one competitor over another, but to promote the development of local telecommunications service competition. The ultimate beneficiaries are not individual competitors, but consumers who realize new and improved services and reduced prices in a competitive market that could only be dreamed about in a protected monopoly market. U S West either misunderstands or refuses to acknowledge the real purposes of the 1996 Act.

The fact that U S West failed to raise the ICAM/network rearrangement issue in its extensive comments on the Commission's Interconnection Notice of Proposed Rulemaking further demonstrates that U S West's ICAM surcharge proposals are nothing more than *post hoc* attempts to forestall competitive entry throughout its territory and to extract additional

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[25]Utah Petition at 5.

[26]Arizona Petition at 6.

compensation for fulfilling its interconnection, unbundled network elements, and resale obligations under the 1996 Act. Despite nine pages of comments summarizing and discussing the current state of takings jurisprudence and public utility regulation, U S West fails to even mention the issue of recovering "up front" costs associated with making its network capable of interconnection. The raising of this issue for the first time before each of the state commissions within its territory indicates that U S West's only purpose in filing its ICAM surcharge requests is to frustrate the interconnection negotiations and arbitration hearings currently in process in an attempt to delay competition within its territory.[27]

Taken in sum, U S West's actions at the state and federal levels in fierce opposition to the pro-competitive goals of the 1996 Act, including its ICAM surcharge requests, conclusively demonstrate its monopolist mentality. The undersigned CLECs already have borne and are continuing to incur the substantial costs associated with building the networks necessary to provide competition in telecommunications markets. U S West apparently wants the CLECs to pay not only their own costs, but also the costs that U S West must incur to upgrade and rearrange its network as needed to fulfill its ILEC local competition obligations under Section

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[27]The proposed ICAM is merely U S West's most recent attempt to thwart the competition that is mandated by the 1996 Act. For example, U S West has had the temerity to seek judicial review of state commission decisions granting certain competitors the authority to provide local service. In Arizona, U S West has appealed, not once -- but twice -- the Arizona Corporation Commission's grant of authority to Teleport Communications Group to offer CLEC services within that State. At the federal level, while U S West's participation in the Eighth Circuit Court of Appeals' review of the Commission's First Report and Order is its most visible attempt to protect its monopoly position as an ILEC, it also has recently failed to meet the Commission's deadline for regional holding companies ("RHC") to begin providing an on-line operational support system ("OSS"). U S West is the only RHC that sought a waiver of this deadline. Despite the fact that NYNEX and Ameritech have operational OSSs and that other RHCs are working toward developing such systems, U S West seeks to gradually phase in its OSS throughout 1997. See First Report and Order, *supra* at ¶ 125.

251(c) of the Act. The Commission must not allow U S West to continue to delay competition within its territory by initiating state actions intended to impose its network upgrade and rearrangement costs on its own customers and on new market entrants.

REQUEST FOR EXPEDITIOUS TREATMENT

Petitioners request expeditious review of this request in accordance with the Commission's stated intent to act expeditiously on requests for declaratory rulings of controversies involving interconnection issues.

CONCLUSION

WHEREFORE, in view of the foregoing, Petitioners respectfully request that the Commission expeditiously issue a declaratory ruling that the initial costs incurred by incumbent local exchange carriers to meet the statutory requirements of the Telecommunications Act of 1996, which are not otherwise recoverable pursuant to Section 252(d) of the Act, are not recoverable through state-imposed surcharges on either competitive local exchange carriers or end user customers. Specifically, Petitioners ask the Commission to declare that the proposed ICAM surcharges sought to be implemented by U S West in each of its states are violative of the 1996 Act. In addition, if any state allows U S West to implement ICAM surcharges, then

they respectfully request that the Commission promptly initiate the necessary proceedings to preempt any state law, rule, regulation or other legal requirement imposing such a surcharge.

Respectfully submitted,

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McLEODUSA, TELECOMMUNICATIONS SERVICES, INC.
NEXTLINK COMMUNICATIONS, L.L.C.

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February 20, 1997

48749.1/0456.0001

EXHIBIT A

Utah Petition

Application of U S West Communications, Inc.
for the Interconnection Cost Adjustment Mechanism
Petition for Declaratory Ruling and Request for Agency Action filed by U S West Communications, Inc.
Dkt. No. 97-049
Filed with the Public Service Commission of Utah on January 3, 1997

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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Application of U S WEST Communications, Inc. for the Interconnection Cost Adjustment Mechanism	:	**Docket No. 97-049-**
	:	**PETITION FOR DECLARATORY RULING AND REQUEST FOR AGENCY ACTION**

COMES NOW U S WEST COMMUNICATIONS, INC. ("USWC") and petitions for a declaratory ruling pursuant to UCA §63-46b-21 and R746-101 requests the Utah Public Service Commission to enter a Declaratory Ruling that it is authorized under UCA §54-3-1, UCA §54-4-1 and UCA 54-8b-11 to enter, and then take agency action to enter, an Order adopting and implementing an Interconnection Cost Adjustment Mechanism ("ICAM") as described below, in the State of Utah for a defined 36 month period commencing thirty days after the filing of this request or as soon thereafter as possible. As grounds in support of its application, USWC states as follows:

1. U S WEST Communications, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Colorado. It is regulated as a telecommunications corporation and a public utility pursuant to UCA Title 54. Pursuant thereto, it is authorized to provide intraLATA telecommunications within the State of Utah. The legal name and mailing